UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of

MANHATTAN COLLEGE,

Employer,

- and - Case No. 2-RC-23543

MANHATTAN COLLEGE ADJUNCT FACULTY UNION, NEW YORK STATE UNITED TEACHERS, AFT/NEA/AFL-CIO,

Petitioner.

RESPONSE TO MANHATTAN COLLEGE'S MOTION FOR THE RECUSAL OF MEMBER NANCY SCHIFFER

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Manhattan College (or the "Employer") has moved to recuse Member Nancy Schiffer in this case on the grounds that she previously worked as an attorney for amicus American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"). As explained below, the motion is baseless because Member Schiffer was not involved in any way in the preparation or submission of the amicus brief submitted by the AFL-CIO in this matter, and the AFL-CIO is not a party to this action. Because the controlling ethical standards do not require a Member of the National Labor Relations Board ("NLRB" or "Board") to recuse herself under the present circumstances, there are no grounds for recusal and Manhattan College's motion is without merit and should be denied.

BACKGROUND

On October 5, 2010, the Manhattan College Adjunct Faculty Union, NYSUT, AFT, NEA, AFL-CIO (the "Union" or "MCAFU") filed a petition with the Board seeking to represent a unit of adjunct faculty at Manhattan College. Manhattan College opposed the election, arguing that it was exempt from the Board's jurisdiction under the Supreme Court's ruling in *N.L.R.B. v. Catholic Bishop*, 440 U.S. 490 (1979). After a hearing on the matter, the then-Acting Regional Director for Region 2 rejected the Employer's argument and issued a Decision and Direction of Election on January 10, 2011 (the "January 10, 2011 Direction of Election"). Manhattan College petitioned for review of the January 10, 2011 Direction of Election, and on February 16, 2011 the Board granted the Employer's request for review. Both parties to the action[1] -- Manhattan College and MCAFU -- filed memoranda of law with the Board in connection with the request for review. In addition, several non-party entities filed briefs amici curiae both in support and in opposition to the January 10, 2011 Direction of Election. Specifically, on September 23, 2011, the AFL-CIO and American Federation of Teachers ("AFT") jointly filed a brief (the "AFL-CIO/AFT Amici Curiae Brief") as amici curiae in support of the January 10, 2011 Direction of Election. The AFL-CIO/AFT Amici Curiae Brief was written and submitted on behalf of the AFL-CIO by Lynn K. Reinhart, AFL-CIO General Counsel, and James B. Coppess, AFL-CIO Associate General Counsel.

At the time the AFL-CIO/AFT Amici Curiae Brief was written and submitted, Board Member Nancy J. Schiffer served as an Associate General Counsel in the AFL-CIO Office of General Counsel. However, Member Schiffer did not participate in the preparation or approval

[1] The AFL-CIO is not, and has never been, a party to this action.

of the AFL-CIO/AFT Amici Curiae Brief. Member Schiffer retired from the AFL-CIO Office of General Counsel in July 2012 and was sworn in as a member of the Board on August 2, 2013.

To date, the Board has not issued a decision on the Employer's request for review and the matter is still pending before the Board. On October 30, 2013, the Employer moved for the recusal of Member Schiffer based on her employment with the AFL-CIO at the time the AFL-CIO/AFT Amici Curiae Brief was submitted. As demonstrated below, the motion is baseless and should be denied.

ARGUMENT

The governing standards guiding executive branch employees' recusal decisions appear in 5 C.F.R. § 2635.502 and Executive Order 13490 (Jan. 21, 2009). In relevant part, 5 C.F.R. § 2635.502 explains that an executive branch employee must decline to participate in a matter when "a person with whom he has a covered relationship *is or represents a party* to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter." 5 C.F.R. § 2635.502(a) (emphasis added). This provision does not warrant Member Schiffer's recusal for several reasons.

First, the AFL-CIO is not a party to this proceeding. As set forth above, the plain language of the regulation requires an agency official to decline to participate in a matter only if someone who stands in a covered relationship to her "is or represents a party to" the matter in question. 5 C.F.R. § 2635.502(a). Section 102.8 of the Board's Rules and Regulations makes clear that an amicus is not a "party" to a proceeding, explaining that "[t]he term 'party' as used herein shall mean . . . any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any

person filing a charge or petition under that act, any person named as respondent, as employer, or as party to a contract in any proceeding under the Act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8(a)(1) or 8(a)(2) of the Act . . . . "

Because the AFL-CIO neither "is" nor "represents a party" in this action, there is no basis for Manhattan College's claim that Member Schiffer should recuse herself. 5 C.F.R. § 2635.502(a). Further, because the AFL-CIO is neither a party nor representing a party to this action, there is no need to look to whether there are any "circumstances [that] would cause a reasonable person with knowledge of the relevant facts to question h[er] impartiality in the matter." 5 C.F.R. § 2635.502(a). Nevertheless, there are no such circumstances in this case; Member Schiffer did not participate in, co-author, or sign the brief at issue in this case.

Second, even if the AFL-CIO were a party to this action, Member Schiffer does not have "a covered relationship" with the AFL-CIO or her former colleagues in the AFL-CIO legal department. As relevant here, an employee has a "covered relationship" with someone whom she "has, within the last year, served as . . . attorney . . . ." Executive Order 13490 § 2635.502(b)(1)(iv). Because Member Schiffer's association with the AFL-CIO ended more than one year ago in July, 2012, enough time has elapsed that she no longer stands in a "covered relationship" with the AFL-CIO or her former co-workers within the meaning of the regulation. *Id*. Because nothing in the regulation requires Member Schiffer to recuse herself, Manhattan College's motion should not be granted under 5 C.F.R. § 2635.502.

Similarly, Executive Order 13490, the other source of controlling ethical guidance for executive agency appointees, does not require Member Schiffer to recuse herself in this action. This Order prohibits appointees from handling "any particular matter involving specific parties that is directly and substantially related to [their] former employer or former clients." *Id.* § 1(2).

The Order defines its operative phrase, "directly and substantially related to [their] former employer or former clients," to mean "matters in which the appointee's former employer or former client *is a party or represents a party*." *Id.* § 2(k) (emphasis added). Again, because Member Schiffer's former employer and former client, the AFL-CIO, is neither a party nor representing a party in the instant action, she is not obligated to withdraw from participation under the terms of Executive Order 13490.[2]

Manhattan College relies almost exclusively on 28 U.S.C. § 455 ("Section 455") to support its motion for recusal. However, this provision does not apply to Members of the Board. Section 455 addresses the circumstances under which "[a]ny justice, judge, or magistrate judge of the United States"[3] should disqualify herself. By its terms, the provision does not apply to administrative officials like Members of the Board. 28 U.S.C. § 455. The Board has never adopted Section 455's standards, so it provides, at most, "useful guidance" in interpreting the governing ethical standards discussed previously. *Serv. Emp. Int'l Union Local 121RN*, 355 N.L.R.B. No. 40, slip op. at 6 (June 8, 2010) (Member Becker, ruling on motions for his recusal).

Even if Section 455 applied, recusal still would not be warranted. Manhattan College does not contend that Member Schiffer "served as lawyer in the matter in controversy," and there is no evidence suggesting that she advised the AFL-CIO in any capacity in its decision to draft or

[2] Although Manhattan College suggests that Member Becker recused himself under analogous circumstances in his opinion in *Serv. Emp. Int'l Union Local 121RN*, 355 N.L.R.B. No. 40, at 7, he did so because he co-authored a brief that was jointly filed by a party and an amicus. Here, Member Schiffer did not co-author the AFL-CIO's brief. Even if she had, there would still be a critical distinction here because the AFL-CIO did not jointly file this brief with a party to the action but instead submitted it independently.

[3] The term "'judge of the United States' includes judges of the courts of appeals, district courts, Court of International Trade and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior." 28 U.S.C. § 451.

file its amicus brief. 28 U.S.C. § 455(b)(2).[4] Although other lawyers with whom Member Schiffer worked at the AFL-CIO authored an amicus brief in the present action, their participation did not rise to the level of "serv[ing] . . . as . . . lawyer[s] concerning the matter" within the meaning of Section 455(b)(2) because they did not represent a party to the action. *Id.*[5]

Finally, even if Section 455(a) were the governing standard when determining whether a Board member should recuse herself – which as demonstrated above it is not – this provision would not require Member Schiffer's disqualification in the present case. Section 455(a) requires that a judge recuse himself when "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Winston*, 613 F.2d 221, 222 (9th Cir. 1980). Because Member Schiffer did not participate in the preparation or approval of the amicus brief at issue here and because the AFL-CIO is neither a party nor representing a party to this action, a reasonable person would not question her impartiality. *Cf. Sao Paulo State of the Federative Republic of Brazil v. American Tobacco Co.*, 535 U.S. 229, 233 (2002) (per curiam) (finding that Section 455(a) did not require a judge to recuse himself where his former organization filed an amicus brief in an earlier, related action involving the same companies because he "took no part in the preparation or approval of" the brief).

[4] Section 455(b)(2) provides that a judge should recuse herself if "in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter." 28 U.S.C. § 455(b)(2).

[5] The case Manhattan College relies upon in urging Member Schiffer's recusal, *Preston v. United States*, 923 F.2d 731, 733-34 (9th Cir. 1991), addresses the unrelated question of whether actual representation of a party by the judge's former colleagues falls within Section 455(b)(2)'s proscription. Section 455(b)(2) does not embrace the significantly attenuated connection to the case Member Schiffer's former colleagues have here. *Hampton v. City of Chicago*, 643 F.2d 478 (7th Cir. 1981), also cited by the Employer, is similarly inapplicable because there the court deferred to a judge's personal decision to recuse himself but did not address broader questions regarding the application of Section 455.

Dated: New York, New York
December 4, 2013

Respectfully submitted,

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